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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL E. BALLMER,

Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD,

Defendant and Respondent.

B200507

(Los Angeles County  
Super. Ct. No. BC287895)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald M. Sohigian, Judge. Affirmed.

Derek L. Tabone for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Felix E. Leatherwood, Jr., and W. Dean Freeman, Supervising Deputy Attorneys General, and Brian D. Wesley, Deputy Attorney General, for Defendant and Respondent.

Plaintiff Paul Ballmer appeals from a judgment after court trial, in favor of defendant Franchise Tax Board (FTB), on claims for injunction and damages for alleged violations of the Information Practices Act of 1977, Civil Code section 1798 et seq. (IPA; undesignated section references are to the Civil Code). The trial court found that plaintiff had failed to establish any violations. We agree, and therefore affirm the judgment.

### **FACTS**

Plaintiff commenced this action in 2003, and filed his operative, second amended complaint (SAC), against the FTB and the State Board of Equalization (SBE), in 2005.<sup>1</sup> The trial court sustained those defendants' demurrer as to one of plaintiff's causes of action, and also struck all claims for monetary damages, on grounds they were barred by plaintiff's failure to file a timely claim under the Government Claims Act, Government Code section 900 et seq. The SBE settled with plaintiff before trial.

The causes of action that were tried involved claims for breach of the IPA by the FTB, and for injunction. Following trial, the court issued a tentative decision, which ultimately became the statement of decision. After noting that plaintiff had filed numerous lawsuits against the FTB, the court rejected his contention that exact compliance with the IPA was a precondition to the FTB's lawfully assessing or collecting income taxes. On the other hand, the court ruled that plaintiff's longstanding failure to file returns or pay taxes did not amount to unclean hands, barring his suit, because the FTB possessed various means to enforce those requirements. The court also rejected certain statutory defenses the FTB had interposed.

The rest of the statement of decision evaluated and rejected plaintiff's contentions that the FTB had not complied with the IPA. We consider these contentions below. Overall, the trial court concluded that plaintiff "is not entitled to any relief. The evidence taken in its entirety and the law show that he does not have a case on any of the theories he asserts."

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<sup>1</sup> The SAC originally included causes of action asserted by another individual, who is not a party to this appeal.

## DISCUSSION

In reviewing the issues adduced, we apply conventional tests. We address de novo legal questions, such as statutory interpretation, application of law to undisputed facts, and interpretation of writings. Factual findings rendered on disputed evidence are reviewed under the substantial evidence test.

The IPA's purpose is to protect individuals' constitutional right of privacy in information pertaining to them, by regulating the collection, maintenance, and dissemination of such personal information. (§ 1798.1.) The IPA applies to most state agencies, including the FTB. (See § 1798.3, subd. (b).) The act defines the "personal information" with which it is concerned as "any information that is maintained by an agency that identifies or describes an individual, including but not limited to . . . name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history." (§ 1798.3, subd. (a).)

Plaintiff presents his claims of FTB noncompliance in the order of the section of the IPA involved. We largely analyze the claims in that order.

### *1. Section 1798.14.*

Section 1798.14 provides that agencies shall maintain in their records only personal information that is relevant and necessary to accomplish a purpose of the agency that is required or authorized by the California Constitution, a statute, or federal government mandate. Plaintiff contends that the FTB violated this provision by including in its records about him a statement that he was a non-filer, or tax protestor.

The evidence showed that plaintiff's account had been labeled "non-filer." Plaintiff does not dispute that this designation was accurate. He contends, however, that it was not relevant, because Steven Su, an FTB disclosure specialist, testified that it would not affect the response provided to the taxpayer's informational inquiry, and thus that it was irrelevant, to Su. The trial court held, however, that listing plaintiff as a non-filer was relevant more generally, because plaintiff's conduct as a non-filer raised special problems or concerns that the FTB had to respond to consistently. We agree. It is neither

gratuitous nor superfluous for the FTB to record in an individual's file the fact that he has not filed a tax return for many years.

*2. Section 1798.16.*

Section 1798.16 provides in relevant part that "when an agency collects personal information," it shall maintain the source of it, including the name of the source, so that it can be provided to "the data subject when they inspect any record pursuant to Section 1798.34." On certain occasions, the FTB estimated plaintiff's annual income by applying a multiplier of four to the amount of mortgage interest plaintiff had paid, as unexceptionably reported by the lender to the Internal Revenue Service (IRS). The FTB used this multiplier based on information from mortgage brokers that lenders required a borrower's income to be at least four times the annual payments.

Plaintiff's contention is that the FTB's inability to identify in discovery the exact sources of the multiplier information signified and constituted a failure to maintain those sources, in violation of the statute. The short answer to this contention is that the multiplier of four, which the evidence indicates the FTB employed in many cases besides plaintiff's, is not personal information (as defined in section 1798.3, subdivision (a)). Therefore, section 1798.16 did not require retention of its sources.<sup>2</sup>

*3. Section 1798.17.*

Section 1798.17 prescribes that a detailed notice be provided, "on or with any form used to collect personal information from individuals," with exceptions for certain police reports and agency requests for basic identifying information, to facilitate communication.<sup>3</sup> Plaintiff's claim of FTB departure from this requirement is multiple.

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<sup>2</sup> In his reply brief, plaintiff seeks to challenge the four-times multiplier as substantively unreliable. Apart from its disqualifying lateness, this claim is not at all a subject of the IPA.

<sup>3</sup> The full text of section 1798.17 is as follows: "Each agency shall provide on or with any form used to collect personal information from individuals the notice specified in this section. When contact with the individual is of a regularly recurring nature, an initial notice followed by a periodic notice of not more than one-year intervals shall

As a non-filer, plaintiff periodically received from the FTB a “Demand for Tax Return,” which the the FTB concedes called for personal information, and therefore required compliance with section 1798.17. The FTB’s position is that it gave the required notice by sending its privacy notice, FTB 1131, together with the demand. The demand included a printed reference to the privacy notice, as enclosed. Plaintiff, however, asserted that he did not receive notice with the demand, and he introduced a 2001 letter he had sent in response, stating that the statutory notice had not been included, and claiming the demand for return was therefore invalid.

The trial court found, to the contrary, that the FTB had sent, and plaintiff had received, the notice. The court expressly disbelieved plaintiff’s testimony, because of his

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satisfy this requirement. This requirement is also satisfied by notification to individuals of the availability of the notice in annual tax-related pamphlets or booklets provided for them. The notice shall include all of the following: [¶] (a) The name of the agency and the division within the agency that is requesting the information. [¶] (b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records. [¶] (c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information. [¶] (d) With respect to each item of information, whether submission of such information is mandatory or voluntary. [¶] (e) The consequences, if any, of not providing all or any part of the requested information. [¶] (f) The principal purpose or purposes within the agency for which the information is to be used. [¶] (g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24. [¶] (h) The individual’s right of access to records containing personal information which are maintained by the agency. [¶] This section does not apply to any enforcement document issued by an employee of a law enforcement agency in the performance of his or her duties wherein the violator is provided an exact copy of the document, or to accident reports whereby the parties of interest may obtain a copy of the report pursuant to Section 20012 of the Vehicle Code. [¶] The notice required by this section does not apply to agency requirements for an individual to provide his or her name, identifying number, photograph, address, or similar identifying information, if this information is used only for the purpose of identification and communication with the individual by the agency, except that requirements for an individual’s social security number shall conform with the provisions of the Federal Privacy Act of 1974 (Public Law 93-579).

bias or interest (Evid. Code, § 780, subd. (f)) and the “suspect” character of his testimony about unwarranted treatment (*id.*, subd. (b)). The court credited the testimony of FTB witnesses who stated the FTB’s policy was to send the privacy notice together with the demand. From that testimony, the court inferred and found that plaintiff had been sent the notice.

Substantial evidence supports this finding. Plaintiff argues that the presumption that official duty is regularly performed (Evid. Code, § 664) – to which the court also referred – was insufficient to overcome his evidence. But he overlooks the circumstantial evidence from the FTB officials’ testimony, which the court was free to and did credit.

Plaintiff further contends that the FTB privacy notice failed in several respects to comply with the requirements of section 1798.17. The trial court found there was compliance, and we agree. First, the court found substantial compliance with subdivision (a), which calls for the name of, and the division within, the agency that is requesting information. All of the versions of the privacy notice in the record refer to the FTB by name, either in title or in first words of text (or shortly thereafter, in one superseded version). Although the notices do not specify a division of the FTB, the court properly found substantial compliance in the notices’ reference to other offices, hierarchically below the divisional level.

Subdivision (c) of section 1798.17 requires statement of the authority (statutory, regulatory, or executive order) authorizing the “maintenance” of the information, which, as plaintiff points out, includes its acquisition by the agency (§ 1798.3, subd. (e)). Plaintiff contends the FTB 1133 privacy notice fails to comply with this requirement, in that it lists only the Revenue and Taxation Code sections that require filing of income tax returns and inclusion of Social Security numbers. (Rev. & Tax Code, §§ 18501, 18621, 18624.) But these are exactly the authorities that the IPA calls for.

Plaintiff also complains of noncompliance with subdivision (e) of section 1798.17, which requires statement of the consequences, if any, of not providing the requested information. The FTB’s notice described the consequences of noncompliance as including penalties and interest; disallowance of claimed exemptions, credits, and

deductions; and in cases of fraud, criminal prosecution. Plaintiff contends that the notice should also have referred to a series of consequences that the FTB acknowledged could ensue should the matter end up in the collection process, such as use of S.W.A.T. teams to raid one's home.

The trial court ruled that plaintiff's list of further consequences was not required. "[T]he statute must be read to refer to proximate consequences and not those remote consequences that are generated by . . . additional conduct on the part of the taxpayer going beyond mere failure to supply the information." This ruling comports with both the law and the FTB testimony. There was no violation of section 1798.17, subdivision (d).

#### *4. Section 1798.24*

Plaintiff contends that the FTB violated section 1798.24, a disclosure statute, by exchanging personal information about certain Californians (apparently non-filers) with the IRS, pursuant to a reciprocal exchange agreement. The statute prohibits agency disclosure of personal information except under certain circumstances. The trial court held that the FTB's disclosures were authorized by subdivision (f) of section 1798.24, which allows transfers of personal information "To a governmental entity when required by state or federal law."

Plaintiff disputes the court's holding, on the ground that disclosure pursuant to a reciprocal agreement with the IRS is required only by contract, not law. But the rationale of the trial court's ruling was that once the FTB enters into such an agreement, its performance is required, as a matter of state law. This holding is sound. Moreover, interstate governmental agreements regularly create legal obligations. (See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm'n* (1978) 434 U.S. 452, 475.)<sup>4</sup>

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<sup>4</sup> Respondent also cites two other provisions: subdivision (e) of section 1798.24, and Revenue & Taxation Code section 19551. The first provision allows disclosure of personal information "to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties . . ." The IRS, however, is not an "agency" for purposes of the IPA. (§ 1798.3, subd. (b).) Revenue and Taxation Code

### *5. Section 1798.32*

Section 1798.32 concerns the right of access to personal records. The first paragraph provides that individuals shall have a right to inquire and be notified whether an agency maintains a record about them. Agencies are to assist individuals in making their requests. There is no issue of FTB noncompliance with this paragraph.

The second paragraph of section 1798.32 provides that “Any notice sent to an individual which in any way indicates that the agency maintains” a record concerning the individual shall include the title and address of the official maintaining the records, the procedures to gain access to them, and the procedures to contest the content of the records, “unless the individual has received this notice from the agency during the past year.”

In terms of the statute’s application to himself, plaintiff contends that the FTB failed to respond fully to questions plaintiff posed in the course of letters in which he contested the validity of demands for return he received. The trial court ruled, however, that the FTB 1131 notice satisfied the requirements of the second paragraph of section 1798.32. We agree. The privacy notice contains enough information under the three categories of that paragraph. Accordingly, having received the notice concurrently with the requests for return, plaintiff underwent compliance with section 1798.32.

Plaintiff also raises an interpretive question, as to whether inclusion of the information stated in the second paragraph of section 1798.32 is required absent an inquiry from the individual, under the first paragraph. Plaintiff vigorously contends that the two paragraphs are separate, and that no such request is required. The trial court held to the contrary. Although plaintiff’s position appears stronger, the question need not be resolved here. Plaintiff does not point to any evidence of injury to himself (or others) in respect of the issue. Plaintiff therefore has not shown standing to raise it.

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section 19551 provides that the FTB may allow the IRS to inspect income tax information. Plaintiff’s objection here is that “may” does not equate to “required,” under section 1798.24, subdivision (f).



6. *Sections 1798.20 and 1798.21.*

Plaintiff contended below that the FTB did not comply with sections 1798.20 and 1798.21. Section 1798.20 requires rules of conduct for persons involved with records containing personal information, and instruction with respect to the rules and the IPA. Section 1798.21 requires “administrative, technical, and physical safeguards,” for compliance with the IPA, and to ensure security and confidentiality of records. The trial court found plaintiff’s contentions unmeritorious, and that “the FTB has extensive training programs, that its training programs are reasonable and well-designed,” that they cover the required subjects, and that the FTB has in place safeguards as required.

These findings were grounded in testimony and exhibits that amount to substantial evidence. That showing is not overcome by plaintiff’s simple and unfounded assertion that the FTB’s “violations of numerous other sections of the IPA” establish noncompliance with sections 1798.20 and 1798.21.

7. *Plaintiff’s Claims for Damages.*

When it ruled on the demurrer to the SAC, the trial court also struck all allegations seeking monetary relief, because “Plaintiffs have not complied with the timely presentation of claim requirements of the Government Code and their presentations of claims after the commencement of this case do not suffice to cure that problem . . . .” Plaintiff now contends this ruling was error, for several reasons. We disagree.

First, plaintiff challenges the validity of *Bates v. Franchise Tax Bd.* (2004) 124 Cal.App.4th 367, a significant decision that held (among other things) that claims for damages under the IPA were subject to the claim-filing requirements of the Government Claims Act, and were not within any recognized exception. (*Bates, supra*, at pp. 382-387.) Plaintiff does not criticize the extensive reasoning of *Bates*. Rather, he argues that the claims act does not apply to claims under the IPA, because section 1798.49 provides a single, two-year limitations period for actions under the IPA, whether for damages (§ 1798.48) or injunction (§ 1798.47). But as plaintiff appears to recognize in his further argument, the claim requirement is not a statute of limitations, but rather a condition precedent to suit, required to provide a public entity defendant with “sufficient

information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation.” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.)

Second, plaintiff argues that he should be deemed to have satisfied the claim requirement because he did present a government claim, two years *after* this lawsuit was filed, but before the SAC. But that simply did not fulfill the requirement that a claim be presented before commencement of suit, for the purposes quoted above. (Gov. Code, § 945.4.) Compliance with that requirement was a necessary element of plaintiff’s cause of action for damages. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234.)

Finally, plaintiff suggests that correspondence between himself and the FTB, before the action was commenced, should be deemed to constitute substantial compliance with the claim presentation requirement. The correspondence in question comprises a request by plaintiff for amendment of his records at the FTB (§ 1798.35), followed by a request for review of the FTB’s response to the initial request. These administrative exchanges do not satisfy the requirements for highly unusual treatment of correspondence as a claim under the substantial compliance doctrine. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 280, pp. 364-365.) The trial court did not err in striking plaintiff’s claims for damages.

**DISPOSITION**

The judgment is affirmed.

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O'NEILL, J.\*

We concur:

RUBIN, ACTING P. J.

FLIER, J.

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\* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.